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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1963

**No. 733**

RICHARD DONALD COSTELLO,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The second opinion in Costello v. U. S. is reported 324 F. 2d 260.

### I. INAPPLICABILITY AND/OR UNCONSTITUTIONALITY OF PRESUMPTION OF IMPORTATION 21 USC 176a.

#### A. Unanswered Arguments.

The respondent leaves unanswered several points in the petition.

1. It is not denied that the opinion of the Ninth Circuit conflicts with *N. Y. Life Ins. Co. v. Gamer*, 303 U.S. 161, 171, holding a presumption inoperative where the record contains evidence sufficient to support a finding contrary to the presumption.

2. It is not denied that the opinion of the Ninth Circuit conflicts with that of the Fifth Circuit in *Stone v. U.S.*, 223 F.2d 23, 25, that a similar statutory presumption does not survive *Government's* evidence to the contrary.

3. The Solicitor General has limited the citations on p. 7 of his Brief in Opposition to the proposition that 21 U.S.C. 176a is constitutional *on its face*. So far as *U.S. v. Kapsalis*, 313 F.2d 875 (CA 7) holds that the presumption survives opposing *Government* evidence it is likewise contrary to *N.Y. Life Ins. Co. v. Gamer*, 303 U.S. 161, 171, and contrary to the Fifth Circuit, *Stone v. U.S.*, 223 F.2d 23, 25.

4. No answer is made to the argument that where something is obtainable in the United States, there is no presumption that it has been lawfully acquired (Pet. p. 9).

5. No answer is made to the argument (Pet. p. 9) that the presumption is used, not to establish the offense, but to establish federal jurisdiction.

**B. Attempted Distinction Yee Hem v. U. S., 268 U.S. 178, Confirms Need for Certiorari.**

On pages 10-11 of its brief, the respondent says, "Petitioner seeks (Pet. 7) to draw a distinction between the presumption as to marihuana and

> the presumption as to opium, upheld by the court in *Yee Hem v. United States*, 268 U.S. 178, on the ground that opium is not grown in this country. However, opium may be legally imported for medicinal purposes. The significant fact is that the restrictions on importation are so great that it is reasonable to presume that the drug was imported illegally."

The respondent adds—

> "Similarly, here it is so unlikely that the marijuana was grown in the United States that it is reasonable to presume that it was imported."

1. This discussion itself shows that the presumption involved in *Yee Hem* and the presumption in the present case are entirely different. It seems to be conceded that opium does not grow in the United States. This being so, the sole question is whether the opium was imported *legally or illegally*. Since legal importation is under very severe restrictions, the presumption is that it is imported illegally at least where the defendant does not produce any documents showing legal importation.

But as to marijuana the question is not whether it has been imported legally or illegally, but whether it has been imported *at all*.

2.a On this issue the Government's (and only) evidence is that marijuana "grows all over the United States, Mexico, Europe, the southern part of Asia, and northern part of Africa; so far as I know, it grows over the major part of the world in the warm climates and the temperate climates." All regions

are put on an equal footing; there is no suggestion that marijuana grows any more or less in one area than in another.

So, we submit, there is no basis whatever for the Solicitor General's statement that "Similarly, it is so unlikely that the marijuana was grown in the United States that it is reasonable to presume that it was imported." Since the Government's evidence is that marijuana "grows all over" without distinction between regions, we submit there is no basis for *presuming* it to be imported rather than domestic. If the presumption be applied, we submit that there is no "rational connection between the facts proved and the facts presumed." (*Tot v. U.S.*, 319 U.S. 463, 467); on the other hand either the rule of *N.Y. Life Ins. Co. v. Gamer*, 303 U.S. 161, 171, or the rule of *Stone v. U.S.*, 223 F.2d 23 (CA 5) make the presumption inapplicable as a rule of evidence.

On the supposed "unlikelihood" of marijuana's growing in the U. S. we call attention to a matter within the judicial notice of the court—the California case of *People v. Gory*, 45 Cal. 2d 776, 291 P.2d 469, where the defendant had marijuana growing in a bucket in his bathroom.

3. The Solicitor General goes into a long discussion of "manicured" and "un-manicured" marijuana (Brief in Opposition, pp. 7-10), which discussion takes him not only outside the opinion below, but outside the evidentiary record. The Solicitor General speculates (p. 8) "In fact, chemical analysis may show that flowering has occurred even though no seeds are

present" and (p. 9) "If petitioner had raised this issue, the Government would have been prepared to offer evidence directly contrary to the Court of Appeals' statements in *Butler*, * * * The court's analysis completely misunderstands the difference between manicured and un-manicured marijuana."

The point is that with or without the added evidence about "manicured" marijuana, the Court of Appeals has gone contrary to the rule of *N.Y. Life Ins. Co. v. Gamer*, 303 U.S. 161, 171, contrary to the Fifth Circuit in *Stone v. U.S.*, 223 F.2d 23, or alternatively contrary to the requirements of *Tot v. U.S.*, 319 U.S. 463, that there be a rational connection between the facts presumed and the facts proved.

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## II. UNLAWFUL SEARCH AND SEIZURE.

### A. Unanswered Argument.

The Government makes no attempt to answer the point that there is a conflict with Judge Bazelon of the District of Columbia Circuit in holding a past record of resulting convictions to be in itself sufficient corroboration of a person himself engaged in crime.

### B. Conflict With Sixth Circuit.

1. In the footnote on Brief in Opposition, p. 6 the Solicitor-General says that *Worthington v. U.S.*, 166 F.2d 557, was disapproved in *Draper v. U.S.*, 358 U.S. 307, 312 N. 4. But that was on a different point. The *Draper* footnote refers to "166 F.2d 557, 564, 565". We referred to "166 F.2d 557, 566" (Pet. p. 11).

2. So there will be no confusion, we note one other point not mentioned so far (and not made a separate ground of the petition). The Court of Appeals refers to the *Childress* case saying "the officers did not know of their own knowledge that the informant's tip had proved out" (Pet. App'x p. v, 324 F.2d 260, 262). This is a factual error in the opinion. In the *Childress* case the conviction was not based on the informer's tip.

See the following testimony of Thompson in the hearing of Sept. 20, 1962. The paging in the original record was R. 14:22-15:15. We do not have the record before us which has been sent to the Supreme Court so do not have access to the new page-numbering. Thompson's testimony is as follows:

"Q. Yes. I believe you stated in substance that after this Cody case or about the same time, or sometime subsequent to that, she gave you the names of other persons engaged in narcotic traffic. Now who were the people she told you engaged in this?

A. I recall one name she gave me. That was Bill Childress and he was subsequently convicted in Anchorage.

Q. But he was not subsequently convicted on any information that she gave you?

A. I don't know whether she furnished information there or not.

Q. But not on information she gave you?

A. No.

Q. Nor on information she gave anybody else. Then so far as you can tell us at this time, the only time there was a conviction based on any

information given to you by Laura Jensen was the one time on the Cody case. Is that correct?

A. That is the only specific case I can think of after a ten year interval, yes."

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## III. CONCLUSION.

It is submitted that, for the reasons stated, certiorari should be granted.

Dated, San Francisco, California,
February 12, 1964.

Respectfully submitted,

GEORGE OLSHAUSEN,
*Attorney for Petitioner.*